

RMcK
Austin, TX

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CORNERSTONE HEALTH CARE GROUP

and

Case 16-CA-154503

ROMAINE REEVES

DECISION, ORDER, AND NOTICE TO SHOW CAUSE

On November 20, 2015, the General Counsel, through the Regional Director for Region 16, issued a complaint alleging that the Respondent has been violating Section 8(a)(1) of the National Labor Relations Act by promulgating and maintaining a work rule prohibiting audio and video recordings. The complaint also alleges that the Respondent has violated Section 8(a)(1) by promulgating and maintaining a mandatory arbitration program. On March 11, 2016, the parties filed a joint motion to waive a hearing and a decision by an administrative law judge and to transfer this proceeding to the Board for a decision based on a stipulated record. On April 15, 2016, the Board issued an Order Approving Stipulation, Granting Motion, and Transferring Proceeding to the Board. Pursuant to that Order, the Board transferred the case to the Board for the purpose of issuing findings of fact, conclusions of law, and a Decision and Order, and set a briefing schedule. The parties thereafter filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.¹

¹ Member Emanuel is recused and has taken no part in the consideration of this case.

1. In support of the complaint’s allegation that the Respondent unlawfully promulgated and maintained its arbitration agreement, the General Counsel relies on the Board’s decisions in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), holding that the maintenance and enforcement of an arbitration agreement requiring employees to waive the right to commence or participate in class or collective actions in all forums, whether arbitral or judicial, violates Section 8(a)(1) of the Act.

Recently, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. *Id.* at ___, 138 S. Ct. at 1619–21, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. *Id.* at ___, 138 S. Ct. at 1619, 1632. In light of the Supreme Court’s decision in *Epic Systems*, which overrules the Board’s holding in *Murphy Oil USA, Inc.*, we conclude that the complaint allegation that the arbitration agreement is unlawful based on *Murphy Oil* must be dismissed.

2. In support of the complaint’s allegation that the Respondent unlawfully promulgated and maintained the work rule prohibiting audio and video recordings, the General Counsel relies on the “reasonably construe” prong of the Board’s decision in *Lutheran Heritage Village-*

Livonia, 343 NLRB 646 (2004) (*Lutheran Heritage*). Recently, the Board overruled the *Lutheran Heritage* “reasonably construe” test and announced a new standard that applies retroactively to all pending cases. *The Boeing Co.*, 365 NLRB No. 154, slip op. at 16-18 (2017). Accordingly, we sever and retain this complaint allegation, and we issue below a notice to show cause why it should not be remanded to the Regional Director for Region 16 for further proceedings in light of *Boeing*.

ORDER

The complaint allegation that the promulgation and maintenance of the mandatory arbitration agreement unlawfully restricts employees’ statutory rights to pursue class or collective actions is dismissed.

Further,

NOTICE IS GIVEN that any party seeking to show cause why the issue whether the remaining complaint allegation should not be remanded to the Regional Director for Region 16 must do so in writing, filed with the Board in Washington, D.C., on or before October 11, 2018 [14 days from the date of this notice] (with affidavit of service on the parties to this proceeding). Any briefs or statements in support of the motion shall be filed on the same date.

Dated, Washington, D.C., September 26, 2018.

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD